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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-786

ROBERT STEPHEN BASEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the Court of Appeals for the Ninth Circuit

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the Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

ROBERT STEPHEN BASEY,

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Petition for a Writ of Certiorari to the Court of Appeals for the Ninth Circuit

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titioner, Robert Stephen Basey, prays that a Writ ertiorari issue to review the judgment of the United s Court of Appeals for the Ninth Circuit, entered is case (Court of Appeals No. 72-1813) on September 972.

OPINION BELOW

e opinion of the Court of Appeals for the Ninth Cir- was not reported. A copy of this opinion is attached o as "Appendix".

JURISDICTION

e judgment of the United States Court of Appeals he Ninth Circuit was entered on September 29, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the opinions announced by the majority of this Court in *Sorrells vs. United States,* 287 U.S. 435 (1932) and *Sherman vs. United States,* 356 U.S. 369 (1958) pose the sole and exclusive test applicable to the defense of entrapment in Federal courts.

2. Whether the predisposition of the accused to commit the offense charged continues to be relevant in the defense of entrapment where uncontradicted evidence shows an unconscionable degree of government participation in the proscribed criminal activity.

3. Whether and to what extent the prosecution bears the burden of proof once the issue of entrapment is fairly raised.

4. Whether uncontradicted evidence that Federal narcotics agents supplied the illicit chemical ingredient essential to the manufacture of the controlled substance for the possession of which petitioner was charged precludes conviction under the doctrine of entrapment as a matter of law.

STATUTES INVOLVED

The statute under which petitioner was prosecuted under Count I of the Indictment, the only relevant charge here involved, was 21 U.S.C. § 841(a)(1), 1970, which provides as follows:

> "§ 841. *Prohibited acts A—Unlawful acts*
>
> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . ."

STATEMENT

A. Nature of the Proceedings Below.

Petitioner, Robert Stephen Basey, was indicted on August 18, 1971, on three counts of violating Title 21, United States Code, Section 841(a)(1) and one count of conspiracy (petitioner was indicted with three other defendants whose cases were resolved before trial and thus not relevant to this Petition).

Petitioner was tried before a jury on November 22-24, 1971. Decision on petitioner's motion for judgment of acquittal at the close of the government's case was reserved. It was denied following the jury verdict.

The jury found petitioner not guilty of Counts II through IV, and guilty of Count I, which charged a violation of Title 21, United States Code, Section 841(a)(1), distribution of a 0.9 gram "sample" of Dl-desoxyephedrine on June 15, 1971.

On January 5, 1972, the District Court denied a motion for a new trial and imposed sentence. Petitioner filed timely appeal with the Court of Appeals for the Ninth Circuit. That Court affirmed on September 29, 1971.

B. Statement of Facts.

The trial was had solely on the testimony of agents of the Federal Bureau of Narcotics and Dangerous Drugs. This testimony revealed that some time shortly prior to June 4, 1971, a Boston agent of the Federal Narcotics Bureau sent four 500 gram bottles of the chemical phenyl-2-propanone (hereinafter referred to as "P2P") to one Karen Lyons in San Diego, California (Reporter's Transcript, page 47, and hereinafter referred to as "Tr., p....."). This chemical is an indispensable ingredient in the manufacture of the illicit drug dl-desoxyephedrine (Tr., p. 77), and a difficult, if not impossible chemical to obtain without

an illegal source (Tr., pp. 56-57). It was supplied to Karen Lyons on the understanding that it would be used to manufacture methamphetamine (dl-desoxyephedrine), three pounds of which would be returned to the suppliers of P2P—the Federal agents in Boston (Tr., p. 54).

On June 4, 1971, Agent Charles Bullock telephoned Karen Lyons from Boston and introduced himself as "the man that Boston said supplied the P2P" (Tr., p. 44) and stated that he could supply greater quantities of the chemical in return for equivalent amounts of the finished drug (Tr., pp. 45-46). At this time Karen Lyons was not manufacturing amphetamine (Tr., p. 46) but she indicated that if Bullock could supply P2P it would be possible to arrange for it (Tr., pp. 46-47).

During the week following this initial telephone conversation, Agent Bullock was in telephone contact with Lyons practically every day (Tr., p. 48). His "orders" from the Bureau, with respect to Lyons, were "to supply her with P2P in exchange for amphetamine powder" (Tr., p. 50), and to "follow through" on the P2P which had already been supplied (Tr., p. 22), none of which had yet been returned to "Boston" in the form of amphetamine (Tr., p. 54).

On June 10, 1971, pursuant to a telephone conversation of that day, Bullock and another agent met with Lyons at a restaurant in San Francisco (Tr., p. 51) where it was disclosed that she had "finally gotten ahold of her man" (Tr., p. 52), so a meeting was arranged for the following Monday, June 14, 1971 (Tr., p. 52).

On June 15, 1971, Agents Bullock and Hochman met petitioner for the first time in the company of Karen Lyons and one Jimmie Kibbee (Tr., p. 14). At this meeting, according to Bullock,

"a conversation ensued about Agent Hockman and I providing phenyl-2-propanone and they delivering amphetamine powder to us" (Tr., p. 15).

Again, agent Bullock testified that this conversation concerned

"the previous arrangements that had been made . . . that myself and agent Hochman were to deliver quantities of phenyl-2-propanone" (Tr., p. 16).

Agent Bullock testified that he and Hochman drove a hard bargain, insisting upon amphetamine worth about $400 for every $60 worth of P2P (Tr., pp. 55-56). They were able to do so because P2P is obtainable only through a special "connection" of the type these agents represented themselves to be (Tr., pp. 56-57). Bullock admitted that the defendants "did indicate that they could get everything else but that [P2P]" (Tr., p. 57). Bullock told Kibbee that "I could get all he wanted when the situation came to it" (Tr., p. 59). He said that he and Hochman would "like to get up to 20 pounds [of amphetamine] a week" (Tr., p. 16), and that they would like to see the manufacturing process by which their P2P was converted into amphetamine (Tr., p. 66). At one point the agents even discussed supplying additional laboratory equipment to meet these demands (Tr., p. 17), but other arrangements apparently made this assistance unnecessary.

At this meeting on June 15, 1971, Kibbee, in the presence of the other defendants, including Basey, produced a small amount of amphetamine as a sample (Tr., pp. 17-18). This became the basis for Count I of the Indictment, the only count for which petitioner was convicted. Although the record does not conclusively establish the source of the P2P which had been used to manufacture the amphetamine, testimony of Agent Bullock reveals that on June 10,

1971 Lyons had only three bottles remaining out of the four which "Boston" had originally supplied (Tr., p. 51). Moreover, by June 15, 1971, no other amphetamine had been produced for the agents (Tr., p. 54).

At the June 15th meeting further arrangements were made for delivery of larger quantities of amphetamine "in exchange for the phenyl-2-propanone" (Tr., p. 20). Thereafter, and at several times, agents met with petitioner and exchanged various quantities of P2P for the finished product (Tr., pp. 22-25). On June 25, 1972, petitioner was arrested at what was purported to be his laboratory (Tr., p. 32), with regard to which a chemist testified that he had received and reviewed all the chemicals seized at the time of the arrest, and that they included all of the ingredients essential to make amphetamine except one: phenyl-2-propanone (Tr., pp. 77-78).

At the conclusion of the government's case, Basey's counsel moved for a judgment of acquittal on the ground that the evidence disclosed entrapment as a matter of law (Tr., p. 100), citing to the Court *United States vs. Chisum*, 312 F.Supp. 1307 (C.D. Cal. 1970). The Court reserved ruling on the motion, and in due course the case was presented to the jury on the issue of entrapment.

After some deliberation the jury sent word that it had two questions: (1) "When was P2P first supplied to the defendant by undercover agents," (Tr., p. 107); and (2) "Was exhibit No. 1 [the sample delivered to the agents on June 15] manufactured from undercover agent's merchandise" (Tr., p. 109). In response to the first question, the Court gave the jury the date of June 4 for shipment of the P2P to Karen Lyons from Boston (Tr., p. 113). With respect to the second question, the Court appeared to agree with counsel that the inference, at least, was that the

sample contained in exhibit 1 contained the P2P sent to Lyons from Boston (Tr., pp. 109-110), and told the jury that:

> "There's just no evidence establishing that one way or the other. What Exhibit 1 was manufactured from . . . there was nothing in the testimony that directly connected Exhibit 1, which I take it was a sample. . . ."
>
> • • •
>
> "By whom, how it was manufactured; not a word establishes that. You might be able to draw certain conclusions, but no reliable evidence at all on that" (Tr., p. 113).

Thereafter the jury convicted Basey on Count I of illegally distributing the sample contained in exhibit No. 1, while acquitting him on all other counts. From the questions asked by the jury and the comments of the District Court, it is clear that the petitioner's entrapment defense was considered to hinge on the evidence—or lack thereof—linking the dl-desoxyephedrine *supplied to* the agents with the particular P2P *supplied by* them. It is the lower Court's approach to this factual issue which petitioner believes to be the heart of the problem.

REASONS COMPELLING ALLOWANCE OF THE WRIT

As Evidenced by the Facts of This Case Viewed in Context with the Applicable Law, the Defense of Entrapment in the Federal Judiciary Continues to Suffer from the Absence of a Cohesive Doctrinal Basis and Clear Test Articulated by This Court.

As surveyed in the Statement, the uncontroverted evidence at trial established that government agents not only approached defendants and urged them to manufacture quantities of the controlled substance, dl-desoxyephedrine, but also supplied them with P2P, the illicit chemical ingredient indispensable to the process. On appeal petitioner urged as error that such conduct on the part of government

agents constitutes entrapment as a matter of law, citing *United States vs. Russell,* 459 F.2d 671 (9th Cir. 1972), a case directly on point and now before this Court on certiorari (Docket No. 72-355).

Rather than respond to—or even mention—the *Russell* case, the Court of Appeals chose instead to characterize the government activity as merely affording the defendant "opportunities and facilities for the commission of the offense in question". *United States vs. Basey,* No. 72-1813 (9th Cir. 1972), Appendix at p. 2. Implicit in its avoidance of *Russell* is the lower Court's out-of-hand rejection of the many principles advanced by courts and commentators dealing with the extremely difficult questions posed in situations such as this where government agents become intimately enmeshed with and actively participate in the very criminal enterprise which is the subject of investigation. Reluctance to confront the issue is, of course, understandable in view of the underlying confusion and disparate rules governing the scope and application of the entrapment defense as it presently exists.

This Court first addressed itself to the entrapment doctrine in *Sorrells vs. United States,* 287 U.S. 435 (1932), propounding a two-fold test for the defense: (1) the crime is the product of the creative activity of the government agents which defendant was induced to participate in; and (2) the defendant did not have a criminal predisposition or design. *Sorrells, supra,* at 451. The majority stated that the basis for the defense was statutory interpretation:

> "We are not forced by the letter to do violence to the spirit and purpose of the statute . . . If the requirements of the highest public policy in the maintenance of the integrity of administration would preclude the enforcement of the statute in such circumstances as are present here, the same considerations would justify

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> the conclusion that the case lies outside the purview of the Act and that its general words should not be construed to demand a proceeding at once inconsistent with that policy and abhorrent to the sense of justice." *Sorrells, supra* at 448-449.

This view was substantially adopted by this Court in *Sherman vs. United States,* 356 U.S. 369 (1957), where the exemplary language of the majority pointed out: "Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations". *Id.* at 372.

While the technique of statutory construction has been propounded as the basis for the defense of entrapment in many Federal courts, this devise has been far from unanimously received. The concurring justices in *Sorrells,* through Mr. Justice Roberts, refused to adopt the fiction of statutory construction and rested their conclusion instead upon an assertion that the courts have inherent power to refuse to become instruments of injustice. *Sorrells v. United States, supra,* at 454-55, (concurring opinion). A similar objection was voiced by the minority in *Sherman.* Speaking for the concurrence, Mr. Justice Frankfurter stated that the power to protect the judiciary for the degradation of convicting persons who had been induced to commit illegal acts derives from the Court's "supervisory jurisdiction over the administration of criminal justice." *Sherman v. United States, supra* at 381, (concurring opinion).

At one with this departure from the statutory construction rationale is the recognition that the principal focus of the defense concentrates upon the activity of government agents rather than upon the guilt or innocence of the accused.

> "The applicable principle is that courts must be closed to the trial of a crime instigated by the government's own agents. No other issue, no comparison of equities as between the guilty official and the guilty defendant,

has any place in the enforcement of this overruling principle of public policy." *Sorrells v. United States, supra,* at 459 (concurring opinion).

"The crucial question, not easy of answer, to which the court must direct itself is whether the police conduct revealed in the particular case falls below standards, to which common feeling respond, for the proper use of governmental power. For answer it is wholly irrelevant to ask if the 'intention' to commit the crime originated with the defendant or government officers, or if the criminal conduct was the product of 'the creative activity' of law enforcement officials." *Sherman v. United States, supra,* at 382 (concurring opinion).

Under this view, then the fundamental issue is the conduct of government officials and the extent of their participation in criminal activity.

"The defendant whose crime results from an entrapment is neither less reprehensible or dangerous nor more reformable or deterrable than other defendants who are properly convicted. Defendants who are aided, deceived or persuaded by police officials stand in the same moral position as those who are aided, deceived or persuaded by other persons. It is the attempt to deter wrongful conduct on the part of the government that provides the justification for the defense of entrapment not the innocence of the defendant." Model Penal Code § 2.10 at 14, Comments (Tent. Draft No. 9, 1959).

While this approach has not been universally accepted, it has found considerable support in the courts of appeal. Some hold that entrapment is concerned *solely* with acts done by agents of the government, *United States v. Russell,* 459 F.2d 671 (9th Cir. 1972), *Gonzales v. United States,* 251 F.2d 298 (9th Cir. 1958), *Polski v. United States,* 33 F.2d

686 (8th Cir. 1929), while others hold that entrapment focuses *primarily* on government activity, *United States v. Morrison,* 348 F.2d 1003 (2nd Cir. 1965), cert. denied 382 U.S. 905, *Walker v. United States,* 344 F.2d 795 (1st Cir. 1965), *Whiting v. United States,* 321 F.2d 72 (1st Cir. 1963), cert. denied 375 U.S. 884, *Williamson v. United States,* 311 F.2d 411 (5th Cir. 1962), *Accardi v. United States,* 257 F.2d 168 (5th Cir. 1958), cert. denied 358 U.S. 883.

Similarly, this position has been well received by a host of commentators. Consider for example: Sherrill, *The Defense of Entrapment: A Plea for Constitutional Standards,* 20 Fla. L. Rev. 63 (1967); Orfield, *The Defense of Entrapment in Federal Courts,* 1 Duke L. J. 39 (1967); Rotenberg, *The Police Detection Practice of Encouragement,* 49 Vir. L. Rev. 871 (1963); Williams, *The Defense of Entrapment and Related Problems,* 28 Fordham L. Rev. 399 (1959); Cowen, *The Entrapment Doctrine in the Federal Courts, and Some State Comparisons,* 49 J. Crim. L., C. & P.S. 447 (1959); Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons and Provacateurs,* 60 Yale L. J. 1091 (1951); Note, 78 Yale L. J. 1046 (1969); Note, 74 Yale L. J. 942 (1965); Note, 26 La. L. Rev. 848 (1960).

A review of these cases and commentaries reveals at very least the extent to which the lower courts have become divided on the issues regarding entrapment. Some follow the majority views expressed in *Sorrells* and *Sherman,* some principally rely on the minority position, while others grope in the middle-ground for a plausible theoretical foundation on which to ground their decisions. The confusing disparity is not surprising since the defense exists without statutory mandate, without judicially articulated constitutional imperative, *United States v. Bailey,* 331 F.2d 218 (7th Cir. 1964), *Stanley v. United States,* 239 F.2d 765 (9 Cir. 1956), and even "without the formulated basis in

reason that it is the first duty of the courts to construct." *Sherman vs. United States,* 356 U.S. 369, 378 (concurring opinion of Mr. Justice Frankfurter).

Thus, both the District Court and the Court of Appeals below, without clear and precise guidelines from this Honorable Court, were free to wander through the conflicting precedents and select any of several tests upon which to premise their holdings. It is into this general confusion which petitioner respectfully invites attention and urges review. Particularly in need of resolution are the problems outlined below.

A. The Law Is Unclear Regarding the Relevancy of Predisposition to the Entrapment Defense.

Classically, entrapment has been defined as "the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer." *Sorrells vs. United States,* 287 U.S. 435, 454 (1932). Mr. Chief Justice Warren explained that "entrapment occurs only when the criminal conduct was the 'product of the *creative activity*' of law enforcement officials [and that] . . . a line must be drawn between the trap for the unwary innocent and the unwary criminal." *Sherman vs. United States,* 356 U.S. 369, 372 (1958) (emphasis in original). On their face, these delineations do little to clarify the elusive doctrine. In this Court's last examination of the entrapment defense, Mr. Justice Harlan, after noting the problems this defense has created in the past, stated that it is "the *manufacturing* of crime by law enforcement officials and their agents" which is of primary concern:

> "Thus before the issue of entrapment can fairly be said to have been presented in a criminal prosecution there must have been at least some showing of the kind of conduct by government agents which may

well have induced the accused to commit the crime charged." *Lopez vs. United States,* 373 U.S. 427, 434-435 (1963).

Beyond these pronouncements, and in view of the relative paucity of decisions from this Court on the question, there is little to provide guidance for distinguishing between impermissible inducement and that type of allowable activity which—as characterized by the court below—merely "affords . . . opportunities and facilities for the commission of the offense in question." Appendix, p. 2.

Since the defense rests upon a finding that government agents in some way elicited the forbidden acts, the predisposition of the defendant to commit the acts in absence of inducement has been held relevant in many cases. Eg., *Matysek vs. United States,* 321 F.2d 246, 248 (9th Cir. 1963), cert. denied, 376 U.S. 917 (1964). Several recent cases, however, have either de-emphasized the relevancy of predisposition or eliminated it entirely as an element of the defense where the conduct of government agents has been particularly repugnant. *United States vs. Chisum,* 312 F.Supp. 1307 (C.D. Cal. 1970); *United States vs. Bueno,* 447 F.2d 903 (5th Cir. 1971); *Green vs. United States,* 454 F.2d 783 (9th Cir. 1971); and *United States vs. Russell,* 459 F.2d 671 (9th Cir. 1972).

In *Bueno, supra,* the defendant was convicted of selling to a Federal agent heroin which he had received from a government informer who also arranged the sale to the agent. The Court of Appeals reversed holding that as a matter of law defendant could not be convicted. No mention was made of predisposition. Similarly in *Chisum, supra,* the District Court held as a matter of law that the accused could not be convicted of receiving counterfeit money which he had originally acquired from a government agent. Again, predisposition was deemed irrelevant.

In *Green vs. United States, supra,* the Court reversed a conviction for manufacturing bootleg whiskey where the government agent involved himself "directly and continuously over . . . a long period of time in the creation and maintenance of criminal operations . . ." *Green, supra,* at 787. The Court there expressly adopted the position that a high degree of government participation in the criminal activity precludes conviction as a matter of law despite clear evidence of predisposition on defendant's part. So too in *Russell, supra,* the Court of Appeals held entrapment as a matter of law (without choosing to affix a label to their result) even though the defendant candidly conceded that he may have harbored a predisposition to commit the charged offense.

> "... [R]egardless of the significance of 'predisposition' as an element of 'entrapment,' we conclude that there is merit in Russell's contention that a defense to a criminal charge may be founded upon an intolerable degree of government participation in the criminal enterprise ..." *United States vs. Russell, supra,* at 673.

Whether or not predisposition is a relevant element in the defense of "entrapment" under the facts of the instant case is key. The activity of the government agents here was certainly as "creative" as that held intolerable in the above-cited cases, and clearly no less deserving of judicial censure. Since various lower courts may under the presently incohesive standards surrounding this issue choose alternatively to countenance and then to condemn identical "investigative" practices, this Court's review is both warranted and compelled.

B. Review Is Necessary to Settle Issues Regarding Proper Quantification and Allocation of Burden of Proof.

Petitioner moved for judgment of acquittal at the close of the government's case on the ground that the evidence

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disclosed entrapment as a matter of law (Tr., p. 97). Implicit in that motion was the contention that the government had failed to sustain its burden of proof relative to the entrapment defense. Believing there to be sufficient evidence for the jury, the trial court denied the motion. Later, upon questions from the jury, however, the trial court commented on exhibit No. 1 (the sample delivered to the agents on June 15, 1971) stating that there was absolutely *no evidence at all* with respect to whether or not that particular substance was manufactured from undercover agents' merchandise (Tr., pp. 109-113). Assuming, *arguendo,* that a direct connection between the illegal ingredient supplied by the agents and the substance contained in exhibit No. 1 is determinative of petitioner's entrapment defense, it is inconceivable that this conviction be allowed to stand without a shred of evidence on that point one way or the other.

The trial court's ruling would seem to imply that *petitioner* had the burden of proving the presence of government-supplied P2P in exhibit No. 1, and that his entrapment defense in effect depended upon such proof. This ruling typifies the pregnant confusion surrounding the defense with regard to assigning burdens of proof between defendant and prosecution. This difficulty derives primarily from the doctrinal problems discussed above, but is compounded by ambiguous rules which have developed as a result of lower courts struggling toward piecemeal answers to a complex problem.

For example, some courts divide the defense into two elements and assign burdens accordingly. "For convenience they [the issues] can be called the primary issue of inducement and the rebuttal issue of predisposition." *Gorin vs. United States,* 313 F.2d 641, 653 (5th Cir. 1963). Many courts require defendant to prove "the primary issue" by

a preponderance before shifting the "rebuttal issue" to the prosecution. *United States vs. Pugliese,* 346 F.2d 861 (2d Cir. 1965); *United States vs. Bishop,* 367 F.2d 806 (2d Cir. 1966). Some courts allocate the burdens but do not quantify them. *United States vs. Prieto-Olivas,* 419 F.2d 149 (5th Cir. 1969); *Kivette vs. United States,* 230 F.2d 749 (5th Cir. 1956). Others place a slight burden upon the defendant such as that of "coming forward with some evidence", *Sagansky vs. United States,* 358 F.2d 195 (1st Cir. 1966), or "fairly raising the issue", *United States vs. Brown,* 421 F.2d 1283 (9th Cir. 1970), cert. denied, 398 U.S. 941, and then shift the burden to the prosecution to prove "nonentrapment beyond a reasonable doubt". This has led some courts to completely reject the bifurcated issue approach and to consider only the "ultimate question of entrapment". *Kadis vs. United States,* 373 F.2d 370 (1st Cir. 1967). The furthest development has been to place no burden of proof whatsoever upon defendant, while requiring the prosecution to *disprove* entrapment beyond a reasonable doubt. *Notaro vs. United States,* 363 U.S. F.2d 169 (9th Cir. 1966).

As becomes apparent from even a brief review of these decisions, the area abounds with disparity. There may be a developing common trend with regard to allocation in that most cases place the burden on the prosecution to disprove entrapment once the issue is raised. However, the method by which the issue arises and the quantity of proof necessary to satisfy these relative burdens remains unclear. In the instant case, if the issue had been "fairly raised" then the prosecution should have been required to disprove entrapment beyond a reasonable doubt. *Robison vs. United States,* 379 F.2d 338 (9th Cir. 1967); *Notaro, supra.* Yet the trial court allowed the issue of entrapment to go to the jury without any evidence at all regarding the source of

P2P contained in the sample. Thus, the trial court not only confused the quantum of proof necessary, but moreover allocated it to the wrong party.

CONCLUSION

For the reasons stated above, this Honorable Court should grant the petition for certiorari and dispose of the issues surrounding this significant area of criminal justice.

Respectfully submitted,

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MESSRS. FILIPPELLI & EISENBERG
Counsel for Petitioner

(Appendix Follows)

Appendix

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ROBERT STEPHEN BASEY, *Defendant-Appellant.*	No. 72-1813

[September 29, 1972]

An Appeal from the United States District Court
for the Northern District of California

Before: CHAMBERS, BARNES and MOORE*, Circuit Judges. BARNES, Circuit Judge:

Appellant Basey was indicted with three co-defendants of the possession, with intent to distribute, various amounts of dl-desoxyephedrine, a "Schedule III controlled substance." This was a four count indictment with three substantive counts (involving .9 gram, 456 grams, and 802 grams, respectively)—[21 U.S.C. § 841(a)(1)]—and a conspiracy count—[21 U.S.C. § 8461]. Appellant Basey was convicted only on Count One, involving a "sample" of the drug in his possession.

Government agents supplied appellant and his co-defendants at differing times with a difficult to get chemical essential to the manufacture of dl-desoxeyephedrine, namely: "phenyl-2-propanone" (commonly known, and hereinafter

*The Honorable Leonard P. Moore, Senior United States Circuit Judge of the Second Circuit, sitting by designation.

referred to, as "P2P"). No defendant testified. The government's testimony as to the "trade" of the P2P for certain quantities of the controlled substance resulted in a jury verdict for all defendants on Counts Two, Three and Four on grounds of government entrapment. The jury, after some deliberation, asked the judge whether the government had supplied the essential chemical (P2P) for the production of the .9 gram which was the subject of Count One. The trial judge stated there was no direct proof "[E]stablishing that one way or the other." (R.T. 112-113) Counsel for defendant below agreed. (R.T. 109-110) The jury decided appellant's entrapment argument failed as to Count One.

Appellant urges as the first error that the evidence established, as a matter of law, entrapment as to Count One. Neither the jury nor the trial judge agreed, nor do we. For government agents to afford a defendant opportunities and facilities for the commission of the offense in question is not enough. There is ample evidence to support an implicit jury finding that the governmental agents did not exert persuasion or pressure of any kind in an effort to induce defendant to commit the offenses charged, i.e., to produce the contraband drug. *See: United States v. Walton,* 411 F.2d 283, 288 (9th Cir., 1969); *United States v. Hodas,* ..... F.2d ....., No. 72-1441 (9th Cir., decided 9/11/72). The jury so found as to Count One, and found to the contrary in Counts Two to Four, inclusive. As triers of fact, that was their right. But their determination was made as a matter of fact, not as a matter of law.

Appellant urges as a second error that the district court mistated the evidence relating to whether the government supplied an essential ingredient to the manufacture of the illegal substance involved in Count One. Appellant urges this evidence is "clear" (Brief, p. 5, citing R.T., pp. 54, 62,

63, and at oral argument, pages 44-47). Again, we disagree. Neither the cited pages nor a careful examination of the entire transcript disclose any significant evidence that the .9 gram referred to in Count One was manufactured with the aid of P2P supplied by the government. When the sample was supplied to the agents, Mr. Kibbee, who produced it, had been and then was manufacturing amphetamines (as related by Agent Bullock) (Ct. Tr., p. 17), and there were other sources of supply from which P2P could be obtained, according to Mr. Kibbee.

The conviction as to Count One is *affirmed.*

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-786

ROBERT STEPHEN BASEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of California, petitioner was convicted of possession of methamphetamine, a controlled substance, with intent to distribute (count 1 of a four count indictment), in violation of 21 U.S.C. 841(a)(1). He was sentenced to imprisonment for a term of three years. On September 29, 1972, the court of appeals affirmed the conviction (Pet. App. A). The petition for a writ of certiorari was not filed until November 28, 1972, and is therefore one month out of time under Rule 22(2) of the Rules

493-372—73

of this Court.[1] In any event, there is no reason for further review.

The evidence at trial showed that shortly before June 4, 1971, a government informant working for the Boston, Massachusetts, office of the Bureau of Narcotics and Dangerous Drugs sent four 500 gram bottles of "P–2–P" (phenyl-2-propanone), an essential ingredient in the manufacture of methamphetamine, to one Karen Lyons in San Diego, California (Tr. 43, 47, 77). The P–2–P was supplied to Miss Lyons on the understanding that it would be used to make methamphetamine; three pounds of methamphetamine so made were to be sent as payment for the P–2–P to the Boston suppliers (Tr. 54).

On June 4, 1971, Agent Bullock, telephoning Miss Lyons from San Diego, stated that he was connected with her Boston supplier (Tr. 42–46). Miss Lyons indicated that she was having trouble contacting the person in San Francisco who had her "equipment" and that not much could be done until she found him (Tr. 46–47). During the following week Agent Bullock and Miss Lyons had daily telephone conversations about her progress in getting the necessary laboratory equipment (Tr. 48–49).

On June 15, 1971, after Miss Lyons had located the man with her equipment (Tr. 52), Agents Bullock and Hochman met with Miss Lyons and two of her accomplices, Roger Herrera and Jimmie Kibbee (Tr.

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[1] In moving for leave to submit the petition out of time, petitioner's counsel alleges that the delay resulted from a misunderstanding, between petitioner and his retained attorney below, as to the filing of the petition for certiorari.

54–55). Kibbee told the undercover agents that his partner, petitioner, wanted to meet them (Tr. 13, 91). Later that day, petitioner was introduced to the two agents, and arrangements were made regarding the exchange of P–2–P for amphetamine powder (Tr. 13–15). Petitioner asked the agents how much amphetamine they wanted and suggested that Kibbee obtain some laboratory equipment in Los Angeles (Tr. 16–17). Kibbee said that other customers were waiting for his amphetamines, which he claimed to be the best in San Francisco (Tr. 17). Agent Bullock then received from Kibbee, in petitioner's presence, a small plastic bag containing 0.9 of a gram of 100% pure D1-desoxyephedrine (G. Ex. 1), the amphetamine upon which Count I was based (Tr. 17–20, 72–76). Before the agents left their meeting, they discussed arrangements for subsequent exchanges (Tr. 20).

On June 17 and 18, 1971, an exchange took place in which petitioner gave government agents four packages containing 444.7 grams of 64% D1-desoxyephedrine and Agents Bullock and Hochman made their first delivery of P–2–P to petitioner (G. Exs. 2–5; Tr. 22–27, 72–74). Petitioner then promised that in a week he could show Bullock and Hochman photographs of a P–2–P laboratory (Tr. 92–93). During the next week petitioner and the government agents stipulated the terms for future transfers (Tr. 25–28). On June 25, 1971, when an exchange of materials was to take place, Agents Bullock and Hochman visited petitioner's laboratory in the kitchen of a motel room (Tr. 30–32). The agents then arrested petitioner along

with Herrera and Karen Lyons, seized all the laboratory equipment and chemicals (there was no P-2-P at the motel that day), and collected seven packages of amphetamine intended for immediate delivery and containing 778 grams of 42% D1-desoxyephedrine (G. Exs. 6–12; Tr. 32–33, 72–75, 78). After his arrest, in an offer to cooperate with federal authorities, petitioner told government agents of an "extensive" P-2-P laboratory that was "quite productive" (Tr. 94–95). He then took them to the laboratory and "surrendered" it (Tr. 95).

Petitioner's case was submitted to the jury on the issue of entrapment. During their deliberations the jury asked when P-2-P was "first supplied to [petitioner] by undercover agents" (Tr. 107). The court answered that the date was June 18 (Tr. 110). Observing that one juror was also wondering about "something that may have been sent from Boston," the court reminded the jury of the shipment, made shortly before June 4, from agents in Boston to Karen Lyons in San Diego. The jury was instructed to determine for themselves the relevance, if any, of such evidence (Tr. 112, 113).

The jury also asked whether Exhibit 1, the 0.9 grams of amphetamine delivered as a sample on June 15, was "manufactured from undercover agents' merchandise" (Tr. 109). The court discussed this problem with counsel for both sides outside of the presence of the jury. Both attorneys agreed with the court that the evidence was unclear as to the source of P-2-P for the sample, but that inferences could

be drawn from the available evidence (Tr. 109–110). The court then stated, in the presence of the jury, that (Tr. 113):

> As to the second question, there's just no evidence establishing that one way or the other. What Exhibit 1 was manufactured from—there was nothing in the testimony that directly connected Exhibit 1 * * *
>
> * * * * *
>
> By whom, how it was manufactured; not a word establishes that. You might be able to draw certain conclusions, but no reliable evidence at all on that.

Thereafter the jury convicted petitioner on Count I, based on the transfer of the "sample" on June 15, but acquitted petitioner on the other counts in which the record was undisputed that the amphetamines were manufactured from P–2–P supplied by the undercover agents.

ARGUMENT

Relying principally on *United States* v. *Russell,* 459 F. 2d 671 (C.A. 9), certiorari granted, October 16, 1972 (No. 71–1585), petitioner alleges that the conduct of the undercover agents "constitutes entrapment as a matter of law" (Pet. 7–8). In *United States* v. *Russell, supra,* a special agent of the Bureau of Narcotics and Dangerous Drugs, acting in an undercover capacity, approached the defendant and several accomplices who were suspected of engaging in the production of methamphetamine tablets. The undercover agent proposed an arrangement whereby the defendant and his accomplices would produce the

methamphetamines and the undercover agent would supply P–2–P without which the methamphetamines could not be produced. The defendant and his accomplices agreed, the methamphetamines were produced, and defendant was charged with manufacture, possession and sale of the drug. On these facts the court of appeals sustained the defense of entrapment "founded upon an intolerable degree of governmental participation in the criminal enterprise" (459 F. 2d at 673). The decision apparently rested principally on the court's conclusion that the P–2–P supplied by the undercover agent was difficult to obtain through other channels, and thus the court determined that "there could not have been the manufacture, delivery, or sale of the illicit drug [at issue in *Russell*] had it not been for the Government's supply of one of the essential ingredients. * * * Russell would have been powerless to 'commit' the charged offenses without the Government's pervasive intervention." (459 F. 2d at 672–673).[5]

Unlike *Russell*, the evidence here does not show that the undercover agents supplied the P–2–P which was used in the manufacture of the 0.9 gram sample of the finished product transferred on June 15. The record is uncontroverted that Agents Bullock and Hochman had supplied no P–2–P to petitioner or his associates

[5] The other cases upon which petitioner relies (Pet. 13) mainly involve instances in which it was held that a defendant could not be prosecuted for possession of contraband which originated with and was supplied by undercover agents and informants.

at the time the 0.9 gram sample was delivered on June 15. Although Karen Lyons had received P–2–P from government informants in Boston before June 4, the record discloses two grounds from which it could reasonably be inferred that the P–2–P used to make petitioner's sample came from a source other than the government shipment from Boston. First, there was a sustantial difference in purity between the sample delivered on June 15 (100% D1-desoxyephedrine) and the amphetamine turned over on June 18 (64% D1-desoxyephedrine). Since Agents Bullock and Hochman supplied no P–2–P until the exchange on June 18, the only government source of P–2–P available for the manufacture of amphetamine used in these two deliveries was the Boston shipment before June 4. Yet if the P–2–P had come from the same source in both instances, comparable degrees of purity in the finished product would be expected. Accordingly, the difference in purity between the two substances in question indicates that they were not necessarily manufactured from the P–2–P supplied by the undercover agents. Second, petitioner referred to a P–2–P laboratory, described as "extensive" and "quite productive", both at the time of the transaction on June 18 and after his arrest. The existence of this laboratory and petitioner's knowledge of it suggest that petitioner and his associates had independent sources of P–2–P available to them. Aside from this evidence clearly indicating an independent source for the P–2–P, we note as the court of appeals did that (Pet. App. 3):

> Neither the cited pages nor a careful examination of the entire transcript disclose any significant evidence that the .9 gram referred to in Count One was manufactured with the aid of P 2 P supplied by the government. When the sample was supplied to the agents, Mr. Kibbee, who produced it, had been and then was manufacturing amphetamines (as related by Agent Bullock) (Ct. tr., p. 17), and there were other sources of supply from which P 2 P could be obtained, according to Mr. Kibbee.

In this case the jury thoroughly considered the issue of the possible sources of P–2–P. Their careful attention to this matter is underscored by the questions they asked during deliberation as well as the fact that they acquitted petitioner on all counts based on transfers after June 15, presumably because of their conclusion that government agents had supplied the P–2–P in the post June 15 amphetamines.[3] The issue raised here as to Count I necessarily turns on the particular

[3] In light of the instructions given by the trial judge this is the only conclusion that can be drawn. The trial judge instructed the jury that "[b]y raising the defense of entrapment the defendant has admitted the commission of all the crimes with which he is charged in the indictment." After going on to give the traditional entrapment instruction, the trial judge further instructed the jury: "Where the methods employed on behalf of the Government fall below standards to which common feelings respond for the proper use of government powers then the predisposition of defendant need not be considered in the defense of entrapment." In these circumstances, the only basis for the acquittal on all counts, except for Count I, was the jury's findings that the undercover agents did not supply the P-2-P for the methamphetamines which were the subject of that count. We are lodging with the Clerk of the Court a copy of the instructions which are part of the file in the district court.

facts and circumstances presented by this case and raises no issue warranting further review.[4]

While it is true that the legal issues petitioner wishes to assert are now before the Court in *Russell* v. *United States*,[5] *supra*, there is no need to hold this case pending the decision in *Russell*, *supra*, since evidence does not establish that the undercover agents supplied the P–2–P in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

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[4] Petitioner argues that in view of the trial judge's comment that there was "no evidence at all" bearing on the issue, the government failed to sustain its burden of proof to defeat the entrapment claim (Pet. 15). As the record reveals, however, the trial judge's statement to the jury, when viewed in terms of his prior dicussion with counsel, referred to the lack of *direct* evidence as to the supplier of P–2–P for the sample and pointed out that an inference could be drawn based on the evidence at hand (Tr. 113). Petitioner's claim that "it is inconceivable that this conviction should be allowed to stand without a shred of evidence * * * one way or the other" on the issue whether the P–2–P was supplied by the undercover agents (Pet. 15) wholly ignores the substantial circumstantial evidence indicating an independent source for the P–2–P at issue. The only person who could have supplied direct contrary evidence was petitioner. The fact that there is not "a shred of evidence" supporting his position is due to petitioner's strategic decision not to testify.

[5] Similar issues in contexts different from *Russell* are raised in *United States* v. *McGrath*, No. 72–761, petition for writ of certiorari filed November 22, 1972, and *United States* v. *Knight*, No. 72–965, petition for writ of certiorari filed January 8, 1973.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-786

ROBERT STEPHEN BASEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petitioner's Reply to Memorandum for the United States in Opposition

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Petitioner's Reply to Memorandum for the United States in Opposition

Petitioner feels compelled to respond to the Memorandum in Opposition because the Government has raised therein arguments not covered in the Petition for Writ of Certiorari. The Government's Memorandum embarks upon a discussion of the "facts" which not only distorts the evidence presented at trial and suggests inferences which petitioner contends are wholly unwarranted, but also totally obscures the significant issues presented to this Honorable Court for review.

This reply is submitted pursuant to Rule 24(4), Revised Rules of the Supreme Court of the United States. The arguments presented in the petition for writ of certiorari principally focused upon the District Court's erroneous failure

to grant petitioner's motion for acquittal at the close of the Government's case relying principally upon *United States v. Russell*, 459 F.2d 671 (9 Cir. 1972), certiorari granted, October 16, 1972 (No. 71-1585), petitioner urged that the conduct of the undercover agents as disclosed by the evidence in this case constitutes entrapment as a matter of law. Compounding its error, the trial court misstated the evidence to the jury. Relating to the jury's question whether the Government supplied an ingredient essential to the manufacture of the illegal substance involved in Count I of the Indictment, the trial court stated "there's just no evidence establishing that one way or the other" (Tr., pp. 109-110) (see Petition, p. 7, and Memo, in Opp., p. 5). Although it is petitioner's contention that the question of entrapment should never had gone to the jury at all, having sent the case to the jury, the trial judge had the responsibility to answer jurors' questions fully, and not to characterize the state of the evidence in an inaccurate or misleading way. As was stated in the petition, "it is the lower court's approach to this factual issue [of entrapment] which petitioner's believes to be the heart of the problem" (Pet., p. 7). Petitioner urges as his reasons for allowing the writ not only the gross errors committed by the trial court below but also the necessity of this Honorable Court's resolution of the confused and disparate positions taken by the various circuits and within the Ninth Circuit itself on the entrapment defense.

The Government attempts to reconcile the obvious conflicts within the Ninth Circuit on the issue of entrapment by attempting to distinguish *Russell*, supra. The Government argues that in *Russell* the defendants would have been "powerless" to commit the charged offenses without persuasive intervention by Federal agents, whereas in the instant case petitioner *could have* committed the charged offense

without such aid. The pertinent language in *Russell* is where Judge Ely states:

> "The challenged conduct on the part of the Government's agent was the supplying of the phenyl-2-propanone, a chemical essential to the manufacture of methamphetamine. The agent himself testified that this chemical was *difficult to obtain* because one must have a manufacturer's license to purchase it at a chemical supply house and because many suppliers were, at the request of the Bureau of Narcotics, no longer selling it at all. *Thus,* there could not have been the manufacture, delivery, or sale of the illicit drug had it not been for the Government's supply of one of the essential ingredients" (*United States v. Russell,* 459 F.2d 671, 672) (Emphasis added).

From this language it is clear that the *Russell* court's conclusion that the defendant there was "powerless" to commit the charged offense rested on the same identical facts as were proved at petitioner's trial, namely that P-2-P was essential to the manufacture of methamphetamine and that P-2-P is extremely *difficult* to obtain. Nowhere in the *Russell* opinion does the court place upon defendant the responsibility or burden of proving under these circumstances that P-2-P was *impossible* to obtain from any other source but the Government agents. The Memorandum in Opposition, however, focuses upon petitioner's failure to prove that he did not and could not obtain the P-2-P from another source.[1]

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1. The Government goes so far as to suggest that petitioner had a *duty* to come forward with such evidence. The Memorandum in Opposition states at page 9 that: "The only person who could have supplied direct contrary evidence was petitioner. The fact that there was not a 'shred of evidence' supporting his petition is due to petitioner's strategic decision not to testify." On this point attention is directed to argument which appears at pages 14 through 16 of the petition for writ of certiorari which, incidentally, the Government's Memorandum also completely ignores.

After attempting to shift the burden of proof to petitioner herein, the Government goes on to discuss the facts in a manner wholly unwarranted by the record. The Government's Memorandum states, "The record is *uncontroverted* that Agents Bullock and Hochman had supplied no P-2-P to petitioner *or his associates* at the time the 0.9 gram sample was delivered on June 15" (Memo. in Opp., pp. 6-7) (emphasis added). This is simply not true. The evidence clearly showed that prior to June 4, Government agents in Boston had sent to Karen Lyons, an associate of petitioner herein, four 500 gram bottles of P-2-P (Tr., p. 47). Evidence showed that this P-2-P was to be used in the manufacture of three pounds of methamphetamine which was to be supplied to Agents Bullock and Hochman (Tr., p. 54). At the time the P-2-P was sent to Lyons, she was not engaged in the manufacture of methamphetamine and in fact depended upon the P-2-P supplied by the Government in order to produce that drug (Tr., p. 46). At the June 10 meeting with Agent Bullock, Lyons said she finally had contacted "her man" and that she had three bottles of P-2-P remaining of the four originally sent by Government agents in Boston (Tr., p. 51). The evidence also showed that at the June 15 meeting, petitioner and Agents Bullock and Hockman discussed among other things the "previous arrangement that had been made" regarding the supply of P-2-P in return for the finished methamphetamine (Tr., p. 16). The evidence showed that at all times prior to June 15, and on that date, Agents Bullock and Hochman represented themselves to be the ones who had sent the P-2-P from Boston (Tr., pp. 43-44). It is clear that at this time the Agents were still seeking a return of three pounds of methamphetamine for the P-2-P which had been supplied to Lyons from Boston (Tr., pp. 54, 62, 63).

Additionally, Agent Bullock testified that he and Hochman drove a "hard bargain," insisting upon amphetamine worth about $400 for every $60 worth of P-2-P (Tr., pp. 55-56). They were able to do so because P-2-P was obtainable only through a special "connection" of the type these Agents represented themselves to be (Tr., pp. 56-57). Bullock admitted that the defendants could get everything else but the P-2-P (Tr., p. 57). Clearly the Government's statement as to the "uncontroverted" evidence that the agents supplied no P-2-P to petitioner or his associates prior to June 15 is false. Moreover it is on facts identical to these that the court in *Russell*, supra, concluded that manufacture of amphetamine there was impossible but for the Government's supply of P-2-P. From these facts it is also clear that the trial court below erroneously stated to the jury that there was "just no evidence establishing that [the source of the P-2-P in the sample delivered on June 15] one way or the other". *Certainly there was substantial evidence of that from the Government's witnesses themselves.*

After making the unsupported statement discussed above, the Memorandum in Opposition proceeds to argue that the record discloses two grounds from which it could be inferred that the P-2-P used to make the petitioner's sample came from a source other than the Government shipment from Boston. These grounds are similarly without merit.

First the Government argues, the difference in purity between the sample delivered on June 15 (100 per cent D1-desoxyephedrine) and the amphetamine turned over on June 18 (64 per cent D1-desoxyephedrine) "indicates that they were not necessarily manufactured from the P-2-P supplied by the undercover agents" (Memo. in Opp., p. 7). Petitioner agrees that the difference in purity does not "necessarily" prove manufacture from the same P-2-P, but neither does it prove, or even raise a reasonable in-

ference, that the amphetamine produced and delivered on June 15 and June 18 were *not* manufactured from the same P-2-P. The difference in purity neither establishes nor infers anything. The Memorandum in Opposition refers to no part of the record wherein any link between purity and a particular source of P-2-P could be drawn. To the contrary, the Government's expert witness in chemical analysis, Gary Sorgen, stated that the impurities were merely "a side product" in the manufacture of amphetamine (Tr., p. 75, lines 14-16). He stated that there was hardly ever a 100 per cent reaction in the amphetamine process (Tr., p. 78, lines 16-19) and that any impurities in the finished product could be *either* "any salt or some other additive" (Tr., p. 79, lines 5-12). No where in the transcript is there any statement wherein Mr. Sorgen indicates any relationship between any particular P-2-P and the purity of the finished amphetamine. Accordingly, the difference in purity can support no reasonable inference regarding the source of the particular P-2-P in any given quantity of amphetamine.

Next the Government's Memorandum suggests that an inference that there was an alternative source of supply available can be drawn from the testimony of Agent Hochman to the effect that petitioner had mentioned a P-2-P laboratory both at the time of the transaction on June 18 and after his arrest. The statement to which the Government refers is found at page 93 of the transcript where Agent Hochman testified:

> "He also mentioned that since we were insistent upon seeing the laboratory he could show us photos of a phenyl-2-propanone laboratory; but it would take a week until he had it."

From this statement it appears that petitioner, if he in fact had made such statement, acknowledged that he did not have such a P-2-P laboratory at the time. The statement

was that it would take a week until he had the laboratory, therefore, it would seem clear that no laboratory existed at the time petitioner allegedly made that statement. It was not until after petitioner's arrest that he allegedly told Agent Hochman that he knew of a P-2-P laboratory which in fact existed and was producing any chemicals (Tr., p. 94). The alleged existence of this laboratory clouds the issues for several reasons. First, there was no substantiation in the record that what Agent Hochman referred to as a "laboratory" was in fact a P-2-P laboratory, or indeed a laboratory at all. Whereas the chemist testified that he had examined what purported to be the amphetamine laboratory (Tr., p. 82), no description of any kind was given with regard to this alleged P-2-P laboratory. Accordingly whatever Agent Hochman saw could very well have been nothing more than an assortment of beakers and flasks. His testimony does not reveal that he found any P-2-P in that alleged laboratory.

Moreover, the existence of such a "productive" laboratory would contradict everything that Agent Bullock said with regard to the fact that defendants could get everything they needed for the manufacture of amphetamine except P-2-P (Tr., p. 56, lines 24-p. 57, line 5).

The difficulty of obtaining P-2-P is punctuated by the fact of petitioner's willingness to supply $400 worth of amphetamines for $60 worth of P-2-P (Tr., p. 56). Regarding the negotiations which occurred on June 15, where the Agents drove "a hard bargain," it would seem more plausible that petitioner would have mentioned the existence of alternative means of supply as a method by which he might obtain a more favorable deal than that which he accepted. However on June 15, the date in question, no mention of alternative supply channels was even suggested. Moreover, it can be noted that if such a P-2-P laboratory was in exis-

tence and producing that chemical, it would have provided the prosecution with grounds for negativing the entrapment defense on the other counts of the Indictment, rather than on Count I. By Agent Hochman's own testimony, the alleged P-2-P laboratory could not have existed prior to June 25 (one week later than June 18). It could, therefore, not have provided a supply for the sample which was delivered on June 15. If the jury disregarded the alleged laboratory, which supposedly existed at a time after June 18, it would seem absurd to accord the existence of such a laboratory any relevance at a time prior to June 18. Certainly the laboratory could not have produced the P-2-P which was used to manufacture the sample delivered on June 15.

After considering the weaknesses of the Government's factual rendering, we are still left with the basic issues presented in the petition, namely the issue of whether or not the trial court erred in submitting the entrapment defense to the jury. As already pointed out, petitioner's arguments with regard to this question have not been discussed in the Government's Memorandum. Instead, the Government has chosen to attempt to dichotomize the facts with regard to Count I from those referring to the other counts. This approach has not only led to a tortured rendering of the evidence adduced at trial, but a complete avoidance of the substantial questions posed by the doctrine of entrapment under the circumstances of this case. With the defendant presenting no evidence at trial, the jury acquitted him on three of the four counts charged. Perhaps anticipating the sense of injustice that prompted the court of appeals in *Russell*, the jury apparently came to focus upon the Agents' conduct in supplying an indispensable ingredient of the illicit substance. *It is probable, they would have acquitted petitioner on Count I as well had they not been misadvised by the Court as the actual state of the evidence.*

This Court has already considered the issues here presented significant enough to grant certiorari in the *Russell* case. The instant petition is equally meritorious and should not be denied—particularly on the basis of the unwarranted inferences which the Government now proposes can or should be made from the evidence at trial.

Dated: January 30, 1973.

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